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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. DURLENE OLEVIA WESTFALL et al., Defendants and Appellants.	E033231 (Super.Ct.No. FSB024269) OPINION

APPEAL from the Superior Court of San Bernardino County. Michael A. Smith, Judge. Affirmed with directions as to Timney. Affirmed as to Westfall.

Richard Schwartzberg, under appointment by the Court of Appeal, for Defendant and Appellant Durlene Olevia Westfall.

Terrence Verson Scott, under appointment by the Court of Appeal, for Defendant and Appellant Thomas Allen Timney II.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Gary W. Schons, Senior Assistant Attorney General, Barry J. T. Carlton, Supervising Deputy Attorney General, and Roberta L. Davis, Deputy Attorney General, for Plaintiff and Respondent.

A jury convicted Thomas Allen Timney II (Timney) and Durlene Olevia Westfall

(Westfall) of first degree murder (Pen. Code, § 187, subd. (a))[1] and two counts of kidnapping (§ 207). As to Timney, the jury found that he used a firearm and discharged a firearm proximately causing death during the murder and one of the kidnappings (§ 12022.53, subds. (a)(1), (b), (c) & (d)) and that he used a firearm during the other kidnapping. As to Westfall, the jury found that a principal was armed with a firearm during all three offenses. (§ 12022, subd. (a)(1).) Timney was sentenced to prison for two consecutive 25-year-to-life terms, plus 18 years. Westfall was sentenced to 25 years to life, plus 7 years. Timney appeals, claiming that the absence of his attorney from a hearing on other defendants' motions to sever requires reversal of his convictions and that the trial court erred in filing an abstract of judgment that does not accurately reflect the sentence it imposed. We reject his first contention and agree with his second. Therefore, we affirm his convictions and order the trial court to amend the abstract of judgment to reflect the sentence it actually imposed. Westfall appeals, claiming jury instruction error. We reject her contention and affirm.

FACTS

On September 27, 1999, a two-year-old child was allegedly abused. Westfall and the child's great-aunt, along with others, confronted the murder victim and the victim who survived (hereinafter, the surviving victim) about this at the home where the child had been staying (hereinafter, the first home) Both victims were hit and the murder victim was pushed. The surviving victim felt that his life was in danger. Against their will, both victims were taken from the first home to the home of Timney's companion.

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[1] All further statutory references are to the Penal Code, unless otherwise indicated.

Westfall and the child's great-aunt were in the car in which the murder victim rode. Sometime after arriving at Timney's companion's home, Westfall called Timney's companion, who was staying at a nearby motel, and told him to come home because she needed help with someone who had beat up a baby. Timney's companion left the motel with Timney, who had been staying in a nearby room. Timney brought along a shotgun, which, when he arrived at his companion's home, he gave to Danny Vasquez to hold on the victims as they sat on the kitchen floor. Timney's companion threatened the surviving victim with a cutting tool. Eventually, the victims were forced to get into Timney's companion's car, with Timney, the companion and Vasquez. Timney's companion drove to a dirt portion of a road near Interstate 15 north of San Bernardino. He walked the surviving victim farther up the road, ostensibly to stab him to death, but, instead, he secretly let him go, urging him to run and not return to the area. Timney shot the murder victim. Later, Westfall and the child's great-aunt insisted on seeing the murder victim's body and what they thought would be the dead body of the surviving victim. They also saw the cutting tool Timney's companion had supposedly used to kill the surviving victim. Westfall gave Timney and his companion a piece of a torn dollar bill and told them they could redeem it for a favor because they had killed the victims.

Timney's companion claimed at trial that Timney had forced him to participate in the crimes. For his part, Timney claimed that his companion had forced him to participate and he accidentally shot the victim while attempting to let the latter escape.

Other facts will be discussed as they are pertinent to the issues raised.

Timney, Westfall, the child's great-aunt, and Vasquez were tried together.

ISSUES AND DISCUSSION

1. *Timney's Representation in Connection With Codefendants' Motions for Severance*

In March 2002, counsel for Vasquez moved for severance of Vasquez's trial from Timney's. The basis of his motion was that Timney confessed to being the shooter, but claimed that he was forced to kill the murder victim because Vasquez had a gun and threatened to kill him if he didn't. Vasquez's attorney asserted that the statement could not be redacted without implicating his client because Timney's companion and the surviving victim would testify at trial that Vasquez was the only other person present with the murder victim and Timney at the time of the shooting.

About three months later, the attorney for the child's great-aunt also moved for severance of her trial from that of Westfall's and Timney's. As to the latter, he asserted only that some of Timney's statements implicated the great-aunt without specifying what they were.

The deputy district attorney filed an opposition to both motions in which she asserted that she had no intention of introducing Timney's statements during her case-in-chief.

Counsel for the great-aunt was subsequently suspended from the bar, and the trial court had to appoint new counsel to represent her. The hearing on the severance motions was set for August 28, 2002.

On that day Westfall's attorney was not present, and the newly appointed counsel for the great-aunt offered to appear for him. Vasquez's attorney appeared for Timney. The deputy district attorney requested that another pretrial hearing be set for September

30, 2002, because she had not yet had an opportunity to go through the sheriff's department notebook. Vasquez's attorney told the trial court that Timney's attorney would be present at this further hearing. The district attorney then suggested that the hearing on the motions to sever also be heard on that date. Vasquez's attorney stated she had no objection to this. The trial court stated that it wanted to read the interviews in case the deputy district attorney ultimately used them during cross-examination. The hearing was rescheduled for September 30th.

Timney requested a *Marsden*[2] hearing, which was scheduled for the following day. Timney's attorney appeared at the *Marsden* hearing and Timney withdrew it.

Timney's attorney was not present on September 30, 2002. The minute order states, "The [c]ourt finds that no motions have been filed on behalf of defendant." Concerning the motions to sever, the trial court stated that it wanted to review the transcripts of statements made by Vasquez and Westfall, and it set a date of October 21, 2002, for further hearing.

On that date, another attorney appeared for Timney's counsel. The trial court noted the deputy district attorney's statement in her responsive papers that she did not intend to use Timney's statements in her case-in-chief. Therefore, the trial court concluded, that portion of the motions related to Timney's statements "[wa]s no longer an issue." The trial court invited comment from counsel about Vasquez's and Westfall's statements. *All counsel submitted without comment*. The trial court then ruled that both

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[2] *People v. Marsden* (1970) 2 Cal.3d 118.

statements could be redacted, so severance was not appropriate.[3]

Based on the foregoing, Timney here asserts that his convictions should be reversed because his attorney's failure to be present at the September 30, 2002, hearing deprived him of the "means of asserting his interests in severance and related evidence [*sic*] issues." However, Timney did not bring a motion for severance, so whatever interest he had in severance was waived.[4] Additionally, he had no evidentiary motion pending, so he waived whatever interest he may have had at the time in any "related evidence."[5] Timney here fails to assert with specificity what he lost by not having his attorney present at that hearing. Moreover, that hearing was provisional only -- the final hearing occurred on October 21, and Timney was there represented.

2. *Accomplice Instructions*

Westfall contends that the jury should have been instructed that Timney was an accomplice, as a matter of law, and the failure of the trial court to do this requires

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[3] Specifically as to Vasquez's statement regarding Timney's presence at the companion's house, the trial court ruled that no such reference could be made at trial.

[4] Timney appears to suggest that his attorney's nonappearance at this hearing was the only reason why a motion for severance and/or a motion to exclude his codefendants' redacted statements under *Bruton v. United States* (1968) 391 U.S. 123 was not brought on his behalf. This is pure speculation. Moreover, we note that no such statements were introduced against Timney at trial.

[5] Counsel for Timney remained free to bring whatever evidentiary motion he deemed appropriate concerning the admissibility of statements made by his codefendants or others. The only evidentiary ruling the trial court made in connection with its denial of the severance motions was that the statements by Vasquez and Westfall, which are not part of the record before this court (but were summarized in the prosecutor's moving papers and the trial court's ruling), could be effectively redacted. Timney does not here

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reversal of her convictions. We disagree.

In *People v. Hill* (1967) 66 Cal.2d 536, 555, the California Supreme Court concluded that a codefendant who confessed on the stand was an accomplice as a matter of law; however, instructions to that effect "might well be construed by the jurors as imputing the confessing defendant's forgone guilt to the other defendants. [Citation.] It is not error ever to forego the giving of accomplice instructions where the giving of them would unfairly prejudice a codefendant in the eyes of the jury." (Accord, *People v. Bittaker* (1989) 48 Cal.3d 1046, 1100.) In *People v. Valerio* (1970) 13 Cal.App.3d 912, 924, this court held, "If the trial court instructed the jury that the codefendant was an accomplice as a matter of law, [the court] would, in effect, be instructing the jury that the codefendant was guilty of the offenses charged, thereby invading the province of the jury with respect to the determination of [the codefendant's] guilt or innocence. Under these circumstances, . . . there was no error in refusing to instruct that the codefendant was an accomplice as a matter of law."

Westfall's only response to this is that "it is precisely this conundrum which required a severance of defendants." However, nowhere in the record before this court does a motion by Westfall to have her trial severed from Timney's appear, nor does Westfall, in her briefs, refer to any such motion.

Westfall also contends that the jury should have been instructed that Timney's companion was an accomplice as a matter of law. The jurors were instructed that they could conclude that he was an accomplice, whose testimony had to be corroborated. We

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assert that this conclusion was improper or that it prejudiced him.

disagree with Timney that the jury should have been instructed that his status as an accomplice was a foregone conclusion.

One is an accomplice as a matter of law "'only when the facts regarding the witness's criminal culpability are "clear and undisputed."'" (*People v. Brown* (2003) 31 Cal.4th 518, 557.) In *Brown*, "[the witness's claim at trial] . . . that when he got in the car with defendant and [another] he did not know they intended to steal . . . [and once] . . . he found out about the plan . . . [he] did not agree to it . . . [is] sufficient evidence to support the trial court's decision that the witness was not an accomplice as a matter of law." (*Ibid*.) In *People v. Williams* (1997) 16 Cal.4th 635, 680, evidence that one witness drove the defendant to and from the crime scene and that another helped one of the perpetrators dispose of the murder weapon "was not so clear and undisputed that a single inference could be drawn that either . . . would be liable for the '*identical offense[s]*' charged against defendant . . . ." In *In re Pratt* (1980) 112 Cal.App.3d 795, 928, the fact that the witness had been arrested and charged along with all the other defendants did not make him an accomplice as a matter of law where the testimony at trial created some question whether he was an accomplice.

Here, the testimony at trial did not establish, beyond dispute, that Timney's companion was an accomplice as a matter of law, despite the fact that he had originally been charged with murder and two counts of kidnapping.[6] The companion testified that Timney had been following him around with a gun for a week before the crimes; Timney

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[6] As part of a plea bargain, he had pled guilty to voluntary manslaughter and two

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pointed his shotgun at the companion as they were getting in the latter's car to go to the latter's house, and he had it when he told the companion at the murder scene to kill the surviving victim; the companion was afraid of Timney, who was present when the companion was ordered to take the victims into the desert and kill them or the companion himself would be killed; and, after the crimes, Westfall said she wanted to make sure the surviving victim was dead or the companion would be. The companion spared the life of the surviving victim and went to some effort to get him safely away from the others.[7] These facts created an inference that the companion had been forced to participate in the offenses and did not share the intent of the perpetrators. Thus, the facts were not "clear and undisputed" that he was guilty of murder and kidnapping.

Even if such an instruction should have been given, the error is not reversible if sufficient corroboration of the witness's testimony was presented at trial. (*People v. Hathcock* (1973) 8 Cal.3d 599, 617.) "'The evidence required for corroboration of an accomplice "need not corroborate the accomplice as to every fact to which he testifies but is sufficient if it does not require interpretation and direction from the testimony of the accomplice yet tends to connect the defendant with the commission of the offense in such a way as reasonably may satisfy a jury that the accomplice is telling the truth; it must tend to implicate the defendant and therefore must relate to some act or fact which is an element of the crime but it is not necessary that the corroborative evidence be sufficient

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counts of kidnapping.

[7] This is according to the testimony of the surviving victim, as well as the companion.

in itself to establish every element of the offense charged." [Citations.] Moreover, evidence of corroboration is sufficient if it connects defendant with the crime, although such evidence "is slight and entitled, when standing by itself, to but little consideration." [Citations.]' [Citations.]" There was such corroboration here.

The following constitutes the testimony of Timney's companion implicating Westfall in the crimes and the corroboration supplied by other sources (in italics): Westfall called the companion at the motel and said she needed help because someone had beaten up a baby. She told him to go to his house. *The companion told the police that Westfall had paged him on the morning of the crimes.*[8] *Another witness testified that Westfall was at the first home with the mother of the alleged abused child and the child's great-aunt, questioning the victims, and Westfall pushed the murder victim. The surviving victim testified that Westfall was at the first home. Timney*[9] *testified that Westfall called him at the motel and told him to get together with his companion.*

The companion testified that Westfall was at the former's house. *The surviving victim and Timney both testified to the same*.

The companion testified that in Westfall's presence at the companion's house,

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[8]Even if the jury concluded that the companion was an accomplice, using this evidence as corroboration of his trial testimony would not violate the rules governing corroboration because it was a pretrial statement, testified to by the police, not the companion's trial testimony.

[9] Because we conclude that the accomplice as a matter of law instructions should not have been given as to Timney, and because no other accomplice instructions as to his testimony were given, the prohibition against one accomplice corroborating another does not apply.

while she stood next to Timney, the companion was told to take the victims into the desert and kill them. *The surviving victim testified that Westfall saw Vasquez holding the shotgun on the victims at the companion's house. The surviving victim told the police that at the companion's house, Westfall and the child's great-aunt had talked about putting duct tape on the victims and burning them with torches to get them to tell the truth, and that they were going to call someone from Los Angeles to come and take care of it*.

We conclude that the companion's testimony was sufficiently corroborated by others. We recognize that the companion testified, without corroboration, about matters that occurred after the crimes which implicated Westfall. Specifically, he testified that Westfall drove to the murder scene, wanting to make sure that the surviving victim was dead, or the companion would be, and both she and the child's great-aunt inspected the weapon the companion had used on the surviving victim. He also testified that Westfall had asked Timney and Vasquez if they had seen this victim's body. However, we do not view the lack of corroboration of these matters as rendering insufficient the corroboration of the other matters testified to by the companion, as stated above.

3. *Resentencing of Timney*

On July 18, 2003, Timney was sentenced to two consecutive 25-year-to-life terms, plus 18 years. Although the trial court did not specifically state that it was staying or running the term for the kidnapping of the murder victim (count 2) concurrently with the term for the murder (count 1), it stayed all the enhancements attached to this count under section 654. It also commented that it was uncertain if a consecutive term for the

kidnapping of the murder victim was appropriate "since the kidnapping from [the companion's home] to the scene of the homicide was basically one continuous action." When the prosecutor pointed out to the court that the victims had been held at that home between 45 minutes and several hours, during which "they were threatened," the trial court responded, "That might be false imprisonment, but not a kidnapping."

Timney filed a notice of appeal on July 30, 2003. On May 17, 2004, while this appeal was pending, the trial court filed an abstract of judgment, which appears to have been signed by a deputy clerk of the court on January 28, 2004,[10] but bore the date of the sentencing hearing.[11] According to the abstract, the trial court imposed a full consecutive term for the kidnapping of the murder victim, for a total determinate term of 26 years. The parties agree that the filing of this abstract and the related minute order was improper. The People suggest that we remand the matter for resentencing. However, based on the trial court's comments at the sentencing hearing, clearly stating its conclusion that the kidnapping was part of the murder, and staying, under section 654, all the enhancements attached to the former, we will order the trial court to correct the abstract to reflect the sentence actually imposed by it at the July 18, 2003, sentencing

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[10] A minute order purporting to report the events of July 18, 2003, but authored on February 10, 2004, states, "Principal count deemed Count . . . 3 [(kidnapping of the surviving victim)]. [¶] . . . [¶] Count 2 to run consecutive to Count 3. [¶] . . . [¶] Count 1 to run consecutive to Count 2," and notes that the minutes were corrected on January 29, 2004, and February 6, 2004.

[11] In his brief, Timney asserts that this was accomplished without notice to or the presence of either party. There is no reporter's or clerk's transcript for either January 28, 2004, or May 17, 2004. This, plus the fact that the abstract appears to record proceedings

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hearing.

DISPOSITION

The trial court is directed to amend Timney's abstract of judgment to reflect the sentence that it imposed on July 18, 2003, i.e., a 25-year-to-life term for the murder (count 1), a 25-year-to-life term for the gun-use enhancement attached to it, an upper term of eight years for the kidnapping of the surviving victim (count 3), and a 10-year term for the use of a firearm attached to that count, for a total sentence of two consecutive 25-year-to-life terms, plus 18 years, with all the other terms being stayed pursuant to section 654. In all other respects, the judgments are affirmed.

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RAMIREZ
P. J.

We concur:

McKINSTER
J.

WARD
J.

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that occurred on July 18, 2003, persuades us to assume that Timney is correct.